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No. 14.

October Term, 1911.

IN THE

Supreme Court of the United States.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

INTERNATIONAL COAL MINING COMPANY,
Defendant-in-Error.

In Error to the United States Circuit Court of Appeals for the Third Circuit.

Supplemental Brief for Defendant-in-Error.

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IN THE

Supreme Court of the United States.

No. 168. October Term, 1911.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

INTERNATIONAL COAL MINING COMPANY,
Defendant-in-Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

SUPPLEMENTAL BRIEF FOR DEFENDANT-IN-ERROR.

This case was argued, in this Court, at the October Term, 1911, and subsequently, was restored to the Docket for reargument. The points which the court desires to have reargued are not stated, but from what took place at the former argument of this case, it would seem that all the points presented by the plaintiff-in-error were sufficiently answered except one, to wit,—whether, under the Interstate Commerce Act, a shipper who has been charged a greater compensation for service rendered in the transportation of property than was charged to another shipper or shippers for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, and in

violation of Section 2 of the Act, could recover the excess, charge as damages, when the amount paid by such complaining shipper was the amount of the published tariff of rates.

This action was brought for violation of Section 2 of the Act to Regulate Commerce, and the right to bring the action is found in Section 8 and Section 9, and neither of the three Sections (2, 8 and 9) has been amended since the Act to Regulate Commerce was approved, March 4th, 1887, and to deny the right of the plaintiff in this case to recover would be to hold that the plaintiff's undoubted common law right of action for damages, under the circumstances shown in this case, had been taken away by the Act to Regulate Commerce, and that the right, so far as the recovery of damages is concerned, under Section 8 for a violation of Section 2, does not exist if the complaining shipper is not charged more than the published rate, even though in excess of his competitor, and the shipper is deprived by the Act to Regulate Commerce, of the right to recover damages which he would have been entitled to recover at common law, notwithstanding Section 22 of the Act provides: "And nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

A history of the enactment of the Interstate Commerce Act on March 4th, 1887, will demonstrate that it was intended by Congress to give the shipper, charged more than other shippers for the same service, as set forth in Section 2, the right to recover the excess charged him, even though he was charged the published tariff of rates, which the Act, by Section 6, provided should be filed with the Interstate Commerce Commission, and which Section required that the carriers should not "charge, demand, collect or receive from any person or persons a greater or less compen-

sation for the transportation of passengers or property, or for any service in connection therewith, than is specified in such published schedule of rates, fares and charges as may at the time be in force."

On Wednesday, April 14, 1886, Senator Cullom, Chairman of the Senate Committee, reported the bill to regulate Commerce, and said: (See Debates in Forty-ninth Congress, First Session, page 5, compiled by U. H. Painter);

> "Section 2.
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> "The second section strikes at the evil of which the most serious complaint is made, and made justly, by prohibiting and declaring unlawful every variety of personal favoritism or unjust discrimination between persons. Its provisions are confined to that one great evil, and the object of the section is to place all shippers upon an absolute equality as to the rates charged for a like service under substantially similar circumstances. This section specifically prohibits special rates, rebates, draw-backs, or other devices for discriminating between shippers, similarly situated and making like shipments. This particular and almost universal form of unjust discrimination is carefully defined in this section, and in addition to the fine provided for such an offense in section 7 the carrier is made liable for all charges collected from all persons in excess of the lowest rate charged any person for like shipments during the same period. This section is the most important one, and seems to have been made as strong as possible; but if it can be strenghtened in any way, I for one would be willing to make it stronger in order to do everything possible to break up the existing system of personal favoritism."

On page 451 Mr. Reagan, Chairman of the Committee in the House, which had the matter in charge said, in part, with reference to Section 2 of the Senate Bill above referred to; (Painter's Debates, page 451):

"The second section of the Senate bill differs from the House bill in providing a measure of damages for its violation, and which is inadequate, by saying that a person charged a higher rate than is charged to any other person may collect the difference between such higher rate and the lowest rate charged upon like shipments during the same period.

"This is no improvement on the common-law remedy which may now be invoked for a like purpose. The common law furnishes no practicable remedy for the abuses of power and the unlawful conduct of the managers of railroads. Claimants for small sums as damages can not as a general rule afford the expense of litigation to establish their claims, while the railroad corporations as a rule protract such litigation to such an extent as to wear out the claimants and defeat the ends of justice.

"Their power to tax the commerce of the country at will enables them to supply the revenues necessary to employ the ablest legal talent of the country to represent them, and also to meet court costs; for these purposes the citizens must use his private means. This is known as a matter of common observation to all of us, and if we would protect the public against such wrongs we must furnish a better remedy than the common law. This is admitted in the able report of the Senate's committee.

"The House bill provides for the recovery of full damages and requires the court in each case of recovery to tax the corporation with a reasonable fee for the plaintiff's counsel or attorney fees. This is an improvement of the common-law remedy in that, in case of recovery, it requires the defendant to pay the plaintiff's reasonable attorney's fees. The remedy should go further and require the payment of double or treble damages, and I think I shall offer an amendment for that purpose. Besides this, the railway corporations have the power by discriminations and unfriendly

delays to punish any of their patrons who may attempt by litigation or otherwise to prevent their discrimination and injustice."

On page 556 of Painter's Debates, Forty-ninth Congress, First Session, Section 2 of the bill, as passed by the Senate and as introduced in the House, appears as follows:

"Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful; and any common carrier who shall violate the provisions of this section as aforesaid shall be liable to all persons who have been charged a higher rate than was charged any other person or persons for the difference between such higher rate and the lowest rate charged upon like shipments during the same period; or if such lower rate was made on any time contract or understanding, the said common carrier shall be liable to pay a like rebate or drawback to all other shippers over the same route between the same points who have shipped goods during the time that such contract or understanding was in operation."

It will be noted that the first part of Section 2, as passed by the Senate, was the same as Section 2 of the Act at present, but there was also this addition:

"And any common carrier who shall violate the provisions of this Section, as aforesaid, shall be liable to all persons who have been charged a higher rate than was charged to any other person or persons, for the difference between such higher rate and the lowest rate charged upon like shipments during the same period, or if such lower rate was made on any time contract or understanding, the said common carrier shall be liable to pay a like rebate or drawback to all other shippers over the same route between the same points who have shipped goods during the time that such contract or understanding was in operation."

In appears that the Chairman of the House Committee reported to the House that this measure of damages did not go far enough and the House did not agree to the bill as passed by the Senate. Conference Committees were appointed to confer in regard to the differences in the bills passed by the respective Houses of Congress, and on page 3, Painter's Debates of the Forty-ninth Congress, Second Session, Senator Cullom reported to the Senate on behalf of the Conference Committee, saying:

"Mr. Cullom: Before action on my motion, I desire to make a statement of the changes in the bill. The following is a statement of the changes in the bill as passed by the Senate which have been agreed to and are recommended by the committee of conference.

"Sections 2, 3, and 4 of the Senate bill, prohibiting discriminations, contained provisions in relation to the recovery of damages. These have been stricken out of said sections, and have been grouped together in one section, which is made Section 8 of the committee bill. Except as to this rearrangement, substantially the only change made has been the addition of the provision of the House bill that 'a reasonable counsel or attorney's fee' shall be allowed by the court in every case of the recovery of damages. The parts of

said sections which are stricken out in consequence of the rearrangement referred to are all of section 2 after the word 'unlawful,' in line 13, all of section 3 after the word 'business,' in line 18, and lines 23 to 27, both inclusive, in section 4. No other change is made in section 2."

After this conference report, Section 2 and section 8 were adopted and became a part of the Act in identically the same form that they appear today.

It appears that the Senate Bill provided specifically that any person charged a higher rate than was charged to any other person or persons, might recover "the defference between such higher rate and the lowest rate charged upon like shipments during the same period, or if such lower rate was made on any time contract or understanding, the said common carrier shall be liable to pay a like rebate or drawback to all other shippers, etc." And this provision was objected to by the House Committee as not furnishing sufficient measure of damages but provision should be made for recovery of reasonable attorney's fees and the same was stricken out upon the direct statement by Senator Cullom, in making the conference report, "that the *same provisions* have been grouped together in one section, which is made Section 8 of the Committee bill. *Except as to this rearrangement,* substantially the only change made has been the addition of the provision of the House bill, that a reasonable counsel or attorney's fee shall be allowed by the court in every case of the recovery of damages."

It is perfectly clear, therefore, that Congress understood that Section 8 provided for the recovery as damages the excess charged to a shipper over that charged to any other shipper under the circumstances and conditions set forth in Section 2, and this notwithstanding the fact that the same Act required all rates to be published and observed, and in effect that the only

legal rate was that filed and published with the Interstate Commerce Commission.

There has been no amendment of the Act to Regulate Commerce, so far as we can see, which changes this construction which should be put upon the provisions of the Act referred to. It can hardly be held that Congress intended to forbid rebates, and punish the same by criminal proceedings, but took away the remedy which the shipper had at common law and left him, although damaged, without any remedy, and to be satisfied with the punishment of the carrier by criminal proceeding.

At the former argument, the case of *Mitchell Coal & Coke Co. vs. Pennsylvania Railroad Co.,* on petition for certiorari in this court, was referred to. The certiorari was denied by this court, but upon what grounds does not appear, but that case was entirely different from the case here presented to the Court.

Under Section 2 of the Act, when the facts are shown as set forth therein, the law declares that such action by the carrier "is hereby prohibited and declared to be unlawful," and Section 8 gives the right of action to the party charged more than another under the circumstances set forth, he being injured by an "unlawful" charge. There is no question, under the facts set forth in Section 2, for a Commission to pass upon as to whether there was discrimination or not, or whether the acts of the carrier were unlawful, for the Act itself fixes that such action by the carrier is "unlawful." In the case of *Mitchell Coal & Coke Co. vs. Pennsylvania Railroad Co.,* however, the facts were that the petitioner had mines connected with the main line of the Pennsylvania Railroad by branch tracks, which were owned by it, and other shippers had mines, such as Latrobe and Boliver, also connected with the Pennsylvania Railroad by branch tracks owned by them. The Mitchell Coal & Coke Company claimed that

the Pennsylvania Railroad Company allowed others a certain amount out of the published rate, for transporting the coal from the mines over the branch tracks to the line of the Pennsylvania Railroad, and that it refused to make the same allowance to the Mitchell Coal & Coke Company, and as appears on page 5 of the petition for certiorari:

> "The Referee found that unlawful discriminations had been made by defendant against the plaintiff, and allowed plaintiff fifteen cents on each ton of coal and coke that it had shipped from all its operations to competitive interstate markets over the lines of the defendant railroad from April 1st, 1897 to May 1st, 1901."

The allowances for this transportation over the branch lines is provided for in the Act to Regulate Commerce, Section 15, as follows:

> "If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after a hearing on a complaint, or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this Section."

It appears that for services "connected with such transportation" on the branch lines, the Pennsylvania Railroad Company allowed to the Latrobe and Boliver companies fifteen cents a ton, but declined to make such allowance to the Mitchell Coal & Coke Company, and the whole complaint, notwithstanding references are made by the petitioner to Section 2, must necessarily have been based upon Section 3, which forbids unjust

discrimination and undue preference, and also necessarily some tribunal must pass upon the fact whether this allowance "for service connected with such transportation" created *unjust discrimination* against the petitioner and *undue preference* in favor of the other companies, and as we understand the case, the Court below held that the objection to the jurisdiction of the Court came under the principle announced by this Court in the case of *Texas & Pacific Ry. Co. vs Abilene Cotton Oil Co.*, 204 U. S. 426, and the cases following that decision, to the effect that application must first be made to the Interstate Commerce Commission, which must primarily determine the question of whether there had been unjust discrimination, and this case, we submit, so far as we can see from the decision of the Court below, to which a petition for certiorari was denied, has no bearing upon the present case, where the excess charge to the International Coal Mining Company over others, is declared by law to be "unlawful," the facts and circumstances being shown to be substantially similar. Mitchell Coal and Coke Co. vs. Pennsylvania R. R. Co., 183 Fed. 908.

We, therefore, submit that the judgment of the Circuit Court and Circuit Court of Appeals in this case should be affirmed, and if any other conclusion be reached, it is inevitable that while a shipper may be charged rates in excess of those charged to others at the same time for like service, and sees his competitors on a plane of advantage above that which he can reach, that his common law remedy is destroyed and he can have no relief and must be content, without being put upon a parity with others shipping the same commodity and at the same time.

Respectfully submitted,

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